89-872

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

COMMONWEALTH OF KENTUCKY — PETITIONER

versus

TEDDY LEE COSBY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

I.

SHOULD THIS COURT EXTEND ITS HOLDING IN RICHARDSON v. MARSH, 481 U.S. 200 (1987) TO REQUIRE THAT ALL REFERENCES TO THE DEFENDANT'S VERY EXISTENCE BE DELETED FROM THE CONFESSION OF HIS NON-TESTIFYING CO-DEFENDANT?

II.

DO THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THE STATES IN CAPITAL CASES TO EXCUSE ALL PROCEDURAL DEFAULTS NOT OBVIOUSLY ATTRIBUTABLE TO TRIAL STRATEGY?

III.

MAY ONLY ONE DEATH SENTENCE BE IMPOSED WHEN ONE VICTIM IS BOTH KIDNAPPED AND MURDERED?

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The Attorney General of Kentucky respectfully petitions this Court for a writ of certiorari to review the judgment of the Kentucky Supreme Court.

OPINION BELOW

The opinion below was originally issued on June 9, 1989 and is reproduced at pages 2a-27a of the appendix to this petition. On September 28, 1989 the court below issued an order expressly denying Respondent's timely petition for rehearing. (Appendix 1a). Without referring to Kentucky's petition for rehearing, that order implicitly granted partial relief by modifying seven pages of the original 14-page majority opinion and one page of the original two-page dissenting opinion. (Id.). Additions to the original opinion appear in double brackets, and deletions are double underscored. (Appendix 6a, 9a, 10a, 15a, 24a, 25a, 27a). The

modified opinion below is reported at Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989).

JURISDICTION

The opinion below by the Kentucky Supreme Court became final on September 28, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

The Eighth Amendment to the United States Constitution provides in relevant part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Respondent and his jointly-tried co-defendant, Christopher Walls, were kitchen employees at a Louisville restaurant. (TE VI 30, 69-71, 76-77). Both men were having financial difficulties so serious that the other restaurant employees knew about it. (TE VI 60-61, 71, 116; VIII 21-23). Walls was so far behind on his rent that he had received an eviction notice. (TE VI 60-61; VII 13). Respondent's telephone had recently been disconnected due to utility arrearages. (TE VI 71; VII 14; VIII 21-23). Seventeen days before the crimes, he borrowed money from another

employee to make the down payment on a car. (TE VIII 15-16). Respondent's car payments were $392 every two weeks. (TE VII 14).

For approximately three weeks prior to the crimes, Respondent and Walls exhibited unusual interest in the restaurant's daily receipts. (TE VI 58, 78-79). All the other employees showed some interest but Respondent and Walls asked about it daily, even while off duty. (Id.).

At 10:45 p.m. November 25, 1984, Respondent and Walls were seen sitting in the latter's car outside the restaurant. (TE VI 29-30, 44, 46). At the sight of two witnesses, Walls moved the car to the other side of the building. (TE VI 31). Forty-five minutes later, after assistant manager Kevin Miller had closed the restaurant, Walls persuaded him to open the door so that he supposedly could get something from his locker. (TE VI 19-20). Kevin's girlfriend left at this

time, but after eating at a restaurant across the street she noticed that the car in which Respondent and Walls had been sitting was still there. (TE VI 18-230. She was the last person to see Kevin alive. (Id.).

When they returned to Walls' apartment, Respondent removed a small box from the getaway car and placed it inside the trunk of his own car. (TE X 25-26). Afterwards, at 1:00 or 1:30 a.m., Respondent repaid a small debt to a security guard at the apartment complex and, still later, was able to loan him a small amount of money. (TE VIII 7). Several hours later, Walls paid his landlord a $500 rent arrearage. (TE VII 13). In addition to a $275 check, Walls gave the apartment manager 45 $5 bills. (Id.).

Miller's corpse was found in a pond in suburban Louisville the next day. (TE IV 13). He had been stabbed three times in the back, three times in the chest, and his throat had

been slashed. (TE VI 104-106). His vocal cords had been severed, and his fingertip had been freshly cut but had a band-aid on it. (TE VI 106, 110, 113-114). In addition, there was a hemorrhage underneath his scalp, above and behind the right ear. (TE VI 108). There were blood stains on the ground in two places. (TE VII 5). A boning knife was found sticking in the mud next to the pond. (TE VII 10).

The restaurant safe had been emptied, and cash register tapes had been removed from a desk inside the office. (TE VI 60, 65-66). Miller's car was still parked outside. (TE VI 67). Type "B" blood was found on a bank deposit bag inside the office -- Respondent has type "B" blood, but not his accomplice or the victim. (TE XII 20, 22, 51-53). Blood found on the safe and on the desk matched that of the victim, whose finger had been freshly cut according to the medical examiner. (TE VI 66; VII 53). Walls has type

"A" blood, none of which was identified at either the robbery scene or the murder scene. (TE VII 53).

One of the witnesses who had seen the getaway car parked outside the restaurant positively identified Respondent from a group of photographs. (TE VI 46; VII 31-32). Respondent admitted to his own wife, the police, and a fellow employee, that he and Walls had been together that evening but denied any wrongdoing. (TE VII 28-30; VIII 20; X 55, 61-63; XII 9-10).

A jury found Respondent and Walls guilty of first-degree robbery (20-year sentence), capital kidnapping (death penalty), and capital murder (death penalty). (TR 429-431, 447-449, 486-487, 519-520, 572-573).

On direct appeal of conviction to the Kentucky Supreme Court, Respondent raised 35 issues for review, 19 of which had not been

preserved by contemporaneous objection. Of the two grounds on which the state supreme court reversed, only one (Question #1 herein) had been preserved for appellate review.

REASONS FOR GRANTING CERTIORARI

I.

THE FEDERAL CIRCUITS ARE DIVIDED AS TO THE PROPER RESOLUTION OF THE QUESTION LEFT OPEN BY THIS COURT IN RICHARDSON v. MARSH, 481 U.S. 200 (1987).

The court below reversed Respondent's conviction on the ground that the introduction of a confession by his non-testifying co-defendant violated his Sixth Amendment right to confrontation. Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 369-370 (1989). In accordance with Bruton v. United States, 391 U.S. 123 (1968), all references to Resondent's name had been deleted from the confession. (TE VII 56-58; IX 11). Respondent's name had been replaced with the word "blank." (TE IX 41-100). The jury had been admonished to limit

its consideration of this evidence to co-defendant Walls only. (TE XI 63-64). Despite the foregoing safeguards, the court below held that all references to Respondent's existence should have been deleted from the confession because the other evidence of his guilt was less than "overwhelming." 776 S.W.2d at 369.

The opinion below is erroneous for two reasons. First, the determination of whether or not a violation of the U.S. Constitution does not depend on the relative strength of the other unaffected evidence. A Sixth Amendment violation either occurs or it does not. The strength of the other evidence goes only to the issue of harmless error. Here, however, the Kentucky Supreme Court misinterpreted Bruton and Richardson to mean that it is always error to try a confessor together with a non-confessor, even when the former's statement is "sanitized"

so as to avoid direct implication of the latter. 776 S.W.2d at 370.

Secondly, the opinion below is in direct conflict with what the state supreme court said in Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 787 (1987) [affirmed on other ground, Stanford v. Kentucky, 492 U.S. ___, 109 S.Ct. 2969 (1989)]. There the Kentucky Supreme Court had held that the removal of the non-confessor's name from the confession of his non-testifying co-defendant sufficiently complies with Bruton, supra.

In Richardson v. Marsh, 481 U.S. 200, 211, n.5, this Court left open the question of whether or not all references to the non-confessor's existence must be deleted from the confession of his non-testifying co-defendant.

The utter confusion expressed by the Kentucky Supreme Court on this issue--holding in

1987 that deletion of the name is enough but holding in 1989 that deletion of the person's existence is required--is only the tip of the iceburg. The federal circuits are similarly divided on the matter. For example, the Seventh, Eighth, Ninth, and Eleventh Circuits have held that deletion of the name is enough to avoid a violation of the Confrontation Clause: United States v. English, 501 F.2d 1254, 1263, (7th Cir. 1974); Slawek v. United States, 413 F.2d 957, 964 (8th Cir. 1969); United States v. Sherlock, 865 F.2d 1069, 1080 (9th Cir. 1989); United States v. DeParias, 805 F.2d 1447, 1454 (11th Cir. 1986). The Second, Third, Fifth, Sixth, Eleventh, and District of Columbia Circuits have held that all references to the person's existence must be removed from the confession: United States v. Danzey, 594 F.2d 905, 918-919 (2nd Cir. 1979); United States v. Alvarez, 519 F.2d 1052, 1054 (3rd Cir. 1975);

Clark v. Maggio, 737 F.2d 471, 478 (5th Cir. 1984); United States v. Pickett, 746 F.2d 1129, 1132-1133 (6th Cir. 1984); United States v. Bennett, 848 F.2d 1134, 1142 (11th Cir. 1988); Serio v. United States, 401 F.2d 989 (D.C. Cir. 1968). At least one federal circuit has taken entirely inconsistent positions on this issue within a two-year period of time, just as the Kentucky Supreme Court has done. DeParias, supra 805 F.2d at 1454; Bennett, supra, 848 F.2d at 1142; Stanford, supra, 734 S.W.2d at 787; Cosby, supra, 776 S.W.2d at 369-370.

In view of the foregoing, a writ of certiorari should be issued in order to resolve the question left open in Richardson v. Marsh, supra, 481 U.S. at 211, n.5.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE STATE COURTS TO EXCUSE CAPITAL DEFENDANTS FROM THEIR PROCEDURAL RULES GOVERNING PRESERVATION OF ERROR FOR APPEAL.

Respondent raised 35 separate questions for appellate review, 19 of which had not been preserved by contemporaneous objection. The state supreme court reversed Respondent's conviction on two grounds, one of which was unpreserved (Question #3 herein), holding that such excusal of his procedural default is required by the United States Constitution. Citing Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976), the Kentucky Supreme Court held that, "Our statute [KRS 532.075] and our standard of review is but a codification of the United States Supreme Court mandate." Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 369 (1989).

Neither Beck v. Alabama nor Woodson v. North Carolina stands for the proposition that capital defendants must be excused from the ordinary rules of procedure. Beck v. Alabama held that additional jury instructions on lesser degrees of homicide must be given if the evidence warrants them. Woodson v. North Carolina similarly requires that a sentencing jury be permitted to spare a capital defendant's life in spite of any aggravating circumstances.

It appears that this Court has not yet addressed the precise question raised here. However, in the context of federal habeas corpus litigation the Court has held that a capital defendant is not excused from his procedural default simply because he has been sentenced to death. In Smith v. Murray, 477 U.S. 527 (1986), for example, this Court upheld the denial of a capital defendant's federal habeas corpus claim which had been preserved at trial by

contemporaneous objection but abandoned on direct appeal to the Virginia Supreme Court. The procedural bar was enforced against the capital defendant in Smith just as it was against the non-capital defendant in Murray v. Carrier, 477 U.S. 478 (1986). Emphasizing the important societal interests in finality of judgments, the Court indicated that defense counsel's inadvertence or failure to predict a change in the law would not establish "cause" for excusing a procedural default.

The Kentucky Supreme Court is laboring under the mistaken impression that the "death-is-different" approach required in evidentiary matters also requires a state appellate court to abandon its rules of procedure. In Murray v. Giarratano, ___ U.S. ___, 109 S.Ct. 2765 (1989), this Court indicated otherwise:

> These holdings, however, have dealt with the trial stage of capital offense

adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment. In Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), we declined to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences. And in Satterwhite v. Texas, 486 U.S. 249, ___, 108 S.Ct. 1792, ___, 100 L.Ed.2d 284 (1988) we applied the traditional appellate standard of harmless error review set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) when reviewing a claim of constitutional error in a capital case.

We have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. In Smith v. Murray, 477 U.S. 527, 538, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986), a case involving federal habeas corpus, this Court unequivocally rejected "the suggestion that the principles [governing procedural fault] of Wainwright v. Sykes [433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)] apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws" and similarly discarded the idea that "there is anything 'fundamentally unfair' about enforcing procedural default rules . . . ." Id., 477 U.S. at 538-539, 106 S.Ct. at 2668-2669.

And, in Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983), we observed that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."

Finally, in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), we held that the Eighth Amendment prohibited the State from executing a validly convicted and sentenced prisoner who was insane at the time of his scheduled execution. Five Justices of this Court, however, rejected the proposition that "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." Id., at 411-412, 106 S.Ct. at 2603-2604. Justice Powell recognized that the prisoner's sanity at the time of execution was "not comparable to the antecedent question of whether the petitioner should be executed at all." Id., at 425, 106 S.Ct. at 2610. "It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings do not apply in this context." Ibid. (citations omitted); id., at 429, 106 S.Ct. at 2612 (O'CONNOR, J., joined by WHITE, J., dissenting in part and concurring in result in part) (due process requirements minimal); id., at 434, 106 S.Ct. at 2615 (REHNQUIST, J., joined by

Burger, C.J., dissenting) (wholly executive procedures sufficient).

In Giarratano the Court further held that capital defendants are not constitutionally entitled to counsel for post-conviction proceedings simply because they have been sentenced to death. Given the additional safeguards already built into capital trials, the Court declined to require "yet another distinction between the rights of capital case defendants and those in noncapital cases." Id., 109 S.Ct. at 2771.

The Commonwealth of Kentucky respectfully urges this Court to grant certiorari accordingly.

III.

THE KENTUCKY SUPREME COURT HAS MISAPPLIED THIS COURT'S DECISIONS IN BLOCKBURGER V. UNITED STATES AND WILLIAMS V. OKLAHOMA BY CONCLUDING THAT RESPONDENT CANNOT BE PUNISHED FOR KIDNAPPING AND MURDERING THE SAME VICTIM.

The court below held that Respondent was exposed to double jeopardy by being punished for

murdering and kidnapping the same victim. Under Blockburger v. United States, 284 U.S. 299 (1932), there was no double jeopardy violation because murder and kidnapping each require proof of a fact not required for conviction on the other. Despite the clear teaching of Blockburger, the Kentucky Supreme Court directed that on retrial, Respondent could be convicted of both murder and kidnapping, but death could be imposed for only one of those offenses.

Since Respondent committed two separate and distinct crimes, punishment for the murder of Kevin Miller should not merge into the kidnapping of Kevin Miller or vice versa. "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

KRS 505.020(1); Blockburger, at 284 U.S. 304 (1932). Kentucky adopted the Blockburger approach in Wilson v. Commonwealth, Ky., 695 S.W.2d 854 (1985) and Polk v. Commonwealth, Ky., 679 S.W.2d 231 (1984). Thus, the issue is whether the conviction for capital kidnapping required proof of a separate fact not required to prove the murder. This Court has previously held that capital murder and capital kidnapping are separate and distinct offenses since each requires proof of separate fact not required to prove the other. E.g., Williams v. Oklahoma, 358 U.S. 576, 586-587 (1959).

Under KRS 509.040(1)(b), Kentucky's kidnapping statute, the Commonwealth had to prove Respondent unlawfully restrained Kevin Miller with the intent to advance the commission of a felony (the murder of Kevin Miller). Capital kidnapping further required that the victim not be released alive. KRS 509.040(2).

Death of the hostage is not an element of kidnapping, but if it occurs, the Commonwealth may pursue a capital conviction. Id.

By contrast, capital murder has no requirement of restraint. KRS 507.020 and 532.025. Capital murder can be accomplished without any restraint at all. For example, the sniper picks off his target without confining or moving him; and the bomber who explodes dynamite in a crowded cafe may be miles away from his victims. Capital murder requires either intent to kill or a wanton mental state under circumstances manifesting extreme indifference to human life or an intentional mental state. Capital kidnapping requires no specific mental state, only that the victim not be released alive or subsequently die from serious physical injuries suffered during the kidnapping. In short, the murderer need not restrain his victim, and the kidnapper need not kill his

victim so long as he leaves his victim in a situation he does not survive. Each offense requires proof of a fact the other does not. The Blockburger formula has been satisfied.

"[U]nder the law of Oklahoma, kidnapping is a separate crime, entirely distinct from the crime of murder." Williams v. Oklahoma, at 358 U.S. 586. Soon after robbing a gas station, Williams abducted one man at gunpoint and forced him to drive down a dead-end road where Williams shot and killed the driver. This Court ruled that the "Oklahoma statutes separately create and define the crimes of murder and of kidnapping, and it is evident from their terms that, as held by the Oklahoma court in this case, they create 'separate and distinct offenses.'" Id., at 358 U.S. 584-585. "[T]he court's consideration of the murder as a circumstance involved in the kidnapping crime cannot be said to have resulted in punishing

petitioner a second time for the same offense." Id., at 358 U.S. 586. See also Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862 (1983); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977).

Capital kidnapping and capital murder are separate, distinct crimes. Respondent's jury considered aggravating and mitigating circumstances for each offense. Just as in Williams, supra, consideration of the murder as a circumstance involved in the kidnapping did not constitute double punishment for the same offense. Appellant was punished once for each separate and distinct offense. The fact that Kevin Miller died only once does not erase either his murder or the torture he endured during the kidnapping. Contrary to the conclusion of the Kentucky Supreme Court it is not a double jeopardy violation to impose two

death sentences for kidnapping and murdering the same victim.

CONCLUSION

WHEREFORE, the Commonwealth of Kentucky respectfully petitions this Court for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY
86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. Honorable Ellen B. Ewing, Judge
Indictment No. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

AND 86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. Honorable Ellen B. Ewing, Judge
Indictment No. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellants' petitions for rehearing are denied.

The opinion rendered June 8, 1989, is modified on its face by the substitution of new pages 3, 4, 5, 6, 7, 8 and 14 to the majority opinion and a new page 2 to the dissenting opinion. A copy of the opinion with the modified pages is attached hereto.

ENTERED: September 28, 1989.

/s/ Robert F. Stephens
Chief Justice

RENDERED: JUNE 8, 1989
TO BE PUBLISHED
MODIFIED: September 28, 1989

SUPREME COURT OF KENTUCKY

86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

and 86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT

REVERSING AND REMANDING

Cosby and Walls were indicted and tried together on charges of robbery, kidnapping and murder. Each was found guilty by jury verdict on all charges, and, pursuant to the jury's

recommendation regarding punishment, each was sentenced to twenty years imprisonment for Robbery I, the death sentence for Murder, and a second death sentence for Kidnapping. They have appealed separately as a matter of right to our Court alleging numerous errors relating both to the guilt phase and to the sentencing process. Because some of the numerous claims of error are congruent or reciprocal, we decide both cases in a single opinion as a matter of judicial economy.

On the night of November 25, 1984, Kevin Miller, Assistant Manager at the Applegate's Landing Restaurant in Louisville, Ky., was robbed shortly after the restaurant was closed, and then abducted and murdered. Two days later Walls, who was being questioned about the robbery and Miller's disappearance, directed police to the place where the body was found, a pond at Fisherman's Park, about seven or eight miles from Applegate's Landing Restaurant, and then made a statement.

The victim had six stab wounds in the back and chest, and his throat had been slashed. His fingertip had a fresh cut covered by a Band-Aid, and there was a hemorrhage beneath the scalp from a blow behind the right ear. A boning knife, identified as the murder weapon, was found stuck in the mud nearby.

The Restaurant's safe had been emptied, and cash register tapes had been removed from a desk inside the office. The victim's car was still parked outside. Blood found on the safe and on the desk matched the victim's blood type and was consistent with the victim's freshly cut finger. There was also type "B" blood found on a bank deposit bag, which is consistent with Cosby's blood type.

Walls gave the police a taped statement confessing to many of the details concerning the planning and execution of the robbery, kidnapping and murder as carried out by him and Cosby. In his statement Walls claimed that as

the time approached to kill the victim he changed his mind and Cosby alone stabbed and slashed the victim to death. Walls then helped Cosby throw the body into the pond.

There are thirty different claims of error asserted in the Brief filed on behalf of Walls, and thirty-five claims of error asserted on behalf of Cosby. In Walls' case only four of the alleged errors were preserved by contemporaneous objection as required by RCr 9.22, and as required for instructions by RCr 9.54(2). See also RCr 10.12. Likewise, in Cosby's Brief the claims of error are largely unpreserved, particularly so with reference to the problems as to Cosby generated by a joint trial and so-called "Bruton" issues. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The Commonwealth urges this Court to reconsider the position stated in Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984), holding "that in a death penalty case

every prejudicial error must be considered, whether or not an objection was made in the trial court." See also Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 783 (1987), to the same effect. This position is generated by KRS 532.075, the statute specifying the duties of our Court in reviewing death penalty cases, which states in pertinent part that "[t]he Supreme Court shall consider . . . any errors enumerated by way of appeal." The Commonwealth argues that such consideration should be limited to deciding whether the issue was preserved by contemporaneous objection, and, if not, review should go no further. This is a specious argument rendering the statute meaningless. [[We do not agree]], nor do we believe that this statute oversteps the line between judicial and legislative power. It is a function of the General Assembly to say when and if the death penalty shall be imposed, and this includes the right to prescribe the special type

of review of punishment and errors enumerated by way of appeal prescribed in KRS 532.075, limited only by the Kentucky Constitution, the United States Constitution, and the decisions of the United States Supreme Court.

The idea of imposing a higher standard of review in cases where the death penalty has been imposed did not originate with our Court, nor indeed with our Kentucky General Assembly. Its genesis is the opinions of the United States Supreme Court which have stated in many cases that "death is a different kind of punishment from any other" invalidating procedural rules that tend to "diminish the reliability of the sentencing determination," and "of the guilt determination" as well. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, 403 (1980). Because of the "qualitative difference" from a crime punished by a term of years, "there is a corresponding difference in the need for reliability . . . ." Woodson v. North Carolina,

428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Our statute and our standard of review is but a codification of the United States Supreme Court mandate.

However, there appears to be some need for clarification. Contrary to the Commonwealth's suggestion, we have never suggested that the rules of preservation do not apply "at all" in capital cases. Nor do we interpret KRS 532.075(2) as requiring "total abandonment of the rules of preservation." On the contrary, Ice specifies only that "prejudicial error" must be reviewed regardless of contemporaneous objection, and we hasten to reaffirm that this means errors where there is no reasonable justification or explanation for defense counsel's failure to object, tactical or otherwise, and the totality of circumstances persuades this Court that the defendant may not have been found guilty of a capital offense or

the death penalty may not have been imposed but for the unpreserved error.

Unfortunately, there is one such error in these proceedings. The strongest evidence against Cosby was inextricably bound up in the statement by his codefendant, Walls, so much so that deleting or redacting Cosby's name when the Walls' statement was read to the jury could not possibly have cured the prejudicial effect of this statement against Cosby. We are compelled to conclude that Cosby was so badly prejudiced by the failure to provide separate trials that his convictions must be reversed. In the peculiar circumstances of this case the jury could not "individualize [Cosby] in his relation to the mass" of evidence represented by Walls' statement. the test specified in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, 1571 (1946). Ultimately, when this statement was being used in closing argument to imply Cosby was the

killer, the court admonished the jury that Walls' statement was not evidence against Cosby, but this was as likely to compound the error as to cure it.

The Commonwealth, not the trial court,/is responsible for this reversal because the Commonwealth Attorney, not the trial court, made the decision to try Cosby jointly with Walls. The Commonwealth bears responsibility for knowing before trial the case that will be presented, and then assessing the impact on the trial as a whole of evidence admissible against one defendant and not the other.

The Commonwealth's Brief conceded that the case against Cosby, while enough to submit to a jury, was "not overwhelming." It consisted of circumstantial evidence that he, like Walls, was an employee of Applegate's Landing Restaurant and in rather desperate financial circumstances. Cosby admitted that he was with Walls on the night in question. He had driven

to Walls' apartment about nine that evening, and left with him, returning some time around 11:30 p.m. He was seen by an eyewitness in Applegate's parking lot sitting in Walls' car shortly before closing time. The drop of type "B" blood on the money bag, matching Cosby's blood type, was further evidence against him. Perhaps most critically, after he returned with Walls to Walls' apartment, he was seen by Walls' wife removing a small box from the back of Walls' car, appearing to be dividing up something, and then putting the box with the remainder in it in his car before leaving.

The victim's girlfriend testified that Walls (the man Cosby was with) gained entry into the Restaurant on the pretext of needing to get "some papers out of my locker" just as the Restaurant was closing, at 11:00 p.m. This evidence, taken together with physical evidence establishing the robbery, the abduction and the murder, would have been sufficient to support

Cosby's conviction in a separate trial where Walls' statement would not be part of the evidence. While circumstantial and not overwhelming, the individualized evidence against Cosby is ample to meet the test of proof sufficient to induce conviction of guilt beyond a reasonable doubt of all the elements of the crimes charged. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The fundamental premise in Bruton v. United States, supra, is that the confession of a codefendant when utilized as evidence in a joint trial is prejudicial hearsay as to the nonconfessing defendant to the extent that it incriminates him, and cannot be used unless the name of the nonconfessing defendant can be so redacted or deleted that its use is harmless beyond a reasonable doubt. Otherwise, it violates the accused's fundamental right, guaranteed by the Sixth Amendment, to be

confronted by the witnesses against him. We are cognizant, indeed appreciative, of the recent United States Supreme Court decision in Richardson v. Marsh, 481 U.S. 200, 109 S.Ct. 1702, 95 L.Ed.2d 176, 187 (1987), extolling the value of joint trials to enhance "both the efficiency and the fairness of the criminal justice system." This was a case where one defendant, but not both, made incriminatory statements which, when properly redacted, were used as evidence. But the criminal law to be credible must be concerned with substance, not to be confused with empty formality. The rule in Richardson v. Marsh, as indeed the principle in its precursor from our state, Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), is that a joint trial utilizing a properly redacted statement is appropriate where given the totality of the circumstances no substantial prejudice will result. It is appropriate where the statement

does not provide details that point unerringly to the nonconfessing defendant. Indeed, although inappropriate, it is not reversible error where the proof against the nonconfessing codefendant is so overwhelming that no possible prejudice resulted, the "harmless beyond a reasonable doubt" standard that applies to constitutional error. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 711 (1967).

Unfortunately, from the record before us it is evident that such was not the case here. In his opening statement the Commonwealth Attorney told the jury that he was going to show them that Cosby had the knife in his hand, which he could only do based on Walls' statement. Walls' counsel made statements in closing argument that went so far towards implying that Cosby was the "blank" referred to in Walls' statement that the court felt compelled, on its own initiative, to advise the jury at that time that it was "not to

consider the statement . . . as evidence against Mr. Cosby in this case." In ruling on Cosby's motion for a directed verdict the trial court made statements suggesting that the evidence confirming Cosby's guilt was inextricably bound in Walls' statement. Apparently, even the trial judge could not "individualize [Cosby]" in his relation to the mass of [evidence]. Kotteakos v. United States, supra. The only responsible conclusion is that in present circumstances this cannot be done. The proof is overwhelming as to Cosby, but only because Walls' statement is there to incriminate him. Our responsibility to uphold the criminal justice system transcends our aversion to granting this malefactor a new trial wherein the principal evidence against Cosby will never see the light of day unless Walls takes the stand to testify against him. If, as Walls claims, Cosby was more blameworthy than he, perhaps this can be arranged at the next trial.

These same considerations of prejudice do not obtain in the Walls case. Like Cosby, Walls also failed to pursue a severance as provided in RCr 9.16. Unlike Cosby, there was overwhelming evidence that Walls was guilty as a participant in the robbery and the abduction, and in the murder as well, although his statement shifts blame to Cosby for going through with the murder when he had changed his mind about killing the victim.

Nevertheless, there is at least one critical error in Walls' case, once again precipitated by the joint trial, and this issue was preserved. Over objection Walls' wife was forced to testify on the theory that her testimony was competent as to his codefendant Cosby even though under KRS 421.210(1) she could not be compelled to testify against her husband. But her testimony provided important details incriminating <u>both</u> defendants. It covered their activities before and after the crimes took place and provided

crucial evidence about how, after they returned in Walls' car around 11:30 or 11:45 p.m., first they sat together in the car talking and then Cosby got something out of the backseat of Walls' car and put in the trunk of his own car. She also gave details about the Walls family's bad financial circumstances which reflected on motive and she testified about how Walls washed his tennis shoes after he came home that night.

The trial court limited the Commonwealth in questioning Mrs. Walls only on the subject of "communications that occurred between herself and Mr. Walls when no one else was present."

As we explained in Estes v. Commonwealth, Ky., 744 S.W.2d 421 (1987), "KRS 421.210(1) provides two separate rules:"

> "1) A Testimonial Disqualification--A husband and wife are disqualified from giving testimony regarding 'confidential communications between them during marriage,' as in the former common law disqualification.
>
> 2) A Testimonial Privilege--'Further, neither may be compelled to testify for

> or against the other,' similar to the privilege against self-incrimination." Id. at 424.

Thus, there are two prongs to this statute, the second prong being a "Testimonial Privilege," and, as we stated in Estes "we must recognize [the wife's] right to refuse to give testimony of any kind against her husband, without regard to whether it is a confidential communication." Id. at 425.

In Maddox v. Commonwealth, Ky., 503 S.W.2d 481 (1973), this Court analyzed a factual and legal situation squarely in point. The brothers Maddox were jointly indicted and tried for stealing cattle. The prosecutor called Joyce Maddox, wife of Billy, who was required to testify against her will "on the theory that her testimony would be competent as against Jimmy," and we stated this was "reversible error as to appellant Billy Maddox as it is impossible to limit the effect of her testimony to Jimmy Maddox alone." Id. In the present case the

testimony from Walls' wife implicated Walls as well as Cosby and added critical weight to the prosecution's case because it corroborated his incriminating statement. This is an error that would never have occurred had the Commonwealth had the foresight to require separate trials.

Walls also claims he was prejudiced by the joint trial because Cosby testified and Walls did not, and then Walls' counsel was denied an opportunity to offer an explanation as to why he chose not to testify. Further, Walls claims he was prejudiced because the edited version of his statement read to the jury, deleting Cosby's name and replacing it with the designation "blank" watered down the exculpatory and mitigating value of those self-serving portions of his statement blaming Cosby for going through with the murder after Walls no longer wanted to kill their victim. These arguments, in themselves, are not substantial. Nevertheless,

they represent problems that do not occur with separate trials.

The appellants have received two separate death penalties, one for murder and one for kidnapping. The appellants make a technical argument that neither the indictment nor the instructions presented an issue of capital kidnapping. First they point to the indictment as insufficient because the offense of kidnapping, as set out in Count II, does not allege the facts necessary to elevate the crime to status as a capital offense. Kidnapping is only a "capital offense when the victim is not released alive or when the victim is released alive but subsequently dies as a result of" certain conduct by the kidnappers as specified in the statute. KRS 509.040(2). On the other hand, the heading above the indictment said "Capital Kidnapping," and the Commonwealth filed a notice of aggravating factors as required by KRS 532.025(1) advising:

> "[T]he Commonwealth will seek the death penalty . . . on the theory that the offenses of Murder and Kidnapping were aggravated by the fact that they were committed during the course of a Robbery First Degree."

We need not decide whether the indictment as supplemented by the "notice of aggravating factors" is sufficient since we have ordered new trials and the indictment can, in any event, be amended. And, for the same reason, we need not address the claim of procedural noncompliance appellants assert on grounds that the necessary element to prove capital kidnapping, that "the victim is not released alive," was first presented as a jury issue only at the penalty phase. The appellants were not found guilty of this element at the trial phase. But there was no objection to this trial procedure. If the appellants believe our death penalty statute, KRS 532.025 requires that this factor be found in the guilt as well as the penalty phase, they may so request at the next trial.

A more serious argument arises out of the double death penalty, one imposed for murder and one for kidnapping, when the same act of murder provided the aggravating circumstances in both instances. Because this is a double jeopardy claim it must be considered even though it was not preserved for objection by appellate review. Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977).

The gist of the double jeopardy claim is that the same element that enhances kidnapping to capital kidnapping so that the death penalty can be imposed, causing the death of the victim, is also punished by the death penalty a second time as murder.

Under KRS 505.020(2)(a) one offense merges with another when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the [other] offense." This is a statutory codification of

the Blockburger test used by the United States Supreme Court to define violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger rule cannot be applied simply in the abstract. While we could invent abstract scenarios in which a person might be guilty of capital kidnapping although the victim was not murdered, where, as here, the proof relied upon to elevate the offense of kidnapping to capital kidnapping is the proof that the victim was murdered, the offenses merge. The phrase in the capital kidnapping statute, "when the victim is not released alive," refers to the victim's death being caused by some aspect of the kidnapping, not to a fortuitous and unrelated circumstance.

While capital kidnapping required proof of facts not required for murder, murder here did not require proof of any fact not included in

capital kidnapping. Blockburger, 284 U.S. at 304; 52 S.Ct. at 182.

When the death is related to the kidnapping it is a crime covered by Chapter 507, Criminal Homicide, and punishable as one of the degrees of criminal homicide specified therein. There are two prongs to the double jeopardy principle. A person cannot be twice convicted or twice punished for the same murder. In a new trial the Commonwealth may try the appellants for both kidnapping and murder but at the sentencing phase it must elect to seek the death penalty for either kidnapping or murder. [[Murder and kidnapping merge at the enhancement stage. The additional element that aggravates kidnapping to a capital offense is the murder. The defendant can be convicted and punished for both offenses, but not sentenced to death for kidnapping if he is sentenced to death for murder.]]

The appellants' remaining claims of error are not substantial. Since there will be a remand, it is not necessary that they be addressed in this Opinion. No remaining claim of error which we might address in this Opinion was challenged by contemporaneous objection. We must assume that at new trials counsel for appellants will feel constrained to object where they deem it appropriate, and they are forewarned that failure to do so places them under a heavy burden in the appellate court.

The convictions of both Cosby and Walls are reversed and both cases are remanded to the trial court for further proceedings consistent with this Opinion.

Stephens, C.J., Combs, Gant, Lambert, and Leibson, JJ., concur. Wintersheimer, J., concurs in results only. Vance, J., dissents by separate opinion, [[in which Gant, J., concurs.]]

RENDERED: JUNE 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE VANCE

Respectfully, I do not agree that the judgment should be reversed as to the appellant Christopher Charles Walls. I concede that his wife was erroneously required to give testimony against him but in view of the detailed

statement which he gave concerning his own participation in the crime, I believe that the testimony of his wife was of little consequence in influencing the jury verdict. I concur in the reversal of the judgment against appellant Teddy Lee Cosby but would affirm the judgment against the appellant Walls.

[[Gant, J., joins in this dissent.]]

ORIGINAL

NO. 89-872

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY,

Petitioner

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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CERTIFICATE

I hereby certify that a copy of this brief was deposited in the U.S. Mail, first-class postage prepaid, properly addressed to Mr. David A. Smith and Ms. Carol Ullerich, Assistant Attorneys General, Counsel for Petitioner, State Capitol Building, Frankfort, Kentucky 40601-3494, on December 21, 1989.

J. DAVID NIEHAUS

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, §2, U.S. Constitution

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority . . .

Ky. Rev. Stat. 532.075(2)

The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court respondent, Teddy Lee Cosby, by counsel, moves the Court to deny the petition for certiorari filed in this case by the Commonwealth of Kentucky because petitioner does not state sufficient grounds to demand the attention of this Court under the criteria set out by Rule 17.[1] The state has proposed three questions for review by this Court. The first issue is whether Richardson v. Marsh, (citation omitted) requires that all references to a defendant's existence be deleted from the confession of his non-testifying co-defendant. In this argument the state claims that the Supreme Court of Kentucky has misunderstood and misapplied the rule set out in Bruton v. U.S., 391 U.S. 123 (1968) and Richardson v. Marsh, 481 U.S. 203 (1987) and argues that there is confusion among the various jurisdictions arising from footnote 5 of Richardson v. Marsh in which the Court expressly refused to deal with the question of adequacy of redaction in co-defendant confession cases. Kentucky lists a number of different results obtained, both before and after this Court's decision in Marsh and claims that there is great confusion among the circuits and that this Court should settle the question left open by footnote 5. Respondent answers that this case does not present the issue raised by Kentucky. In this case, the Supreme Court of Kentucky correctly applied Bruton and Marsh to the facts of this case and found that it was impossible to assume that the jury could keep the evidence separated as to each defendant. That court therefore ruled that separate trials were required. Obviously, such a ruling does not deal with the question raised by the Commonwealth.

---

[1] The statement of the case provided by Kentucky is an outline of the evidence adduced which is mostly accurate except for its interpretation of all facts in the light most favorable to the prosecution. There are some specific factual errors that should be noted. Cosby had some unspecified money problems, but according to the witness who spoke about Cosby, "so does everybody for that matter." (TE 6, 71). Cosby's car payment was $150.00 every two weeks. (TE 7, 14). Cosby was on vacation the week before the robbery and was not even present to ask questions about receipts. (TE 6, 79). Cosby never asked the witness any questions about receipts, although he was present when Walls asked on a number of occasions. (TE 6, 79). Cosby's wife was employed full-time during this period. (TE 10, 56). The Commonwealth continues to try to prove Cosby's guilt by evidence primarily applicable to Walls.

As to the second issue raised, Kentucky is asking this Court for an advisory opinion. In this argument Kentucky maintains that the Kentucky Supreme Court has misread Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976) in ruling that the statutory standard of review in capital cases [Ky. Rev. Stat. 532.075] is but a codification of U.S. Supreme Court mandate. [Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky., 1989)]. Careful reading of the state court opinion reveals that this comment is dicta because the "Ice" rule complained of is merely an application of Ky. Rev. Stat. 532.075 and that the decision of the Supreme Court of Kentucky, based on that statute, is an adequate independent state ground of decision and therefore not amenable to correction by this Court as a matter of federal constitutional law. In addition, the opinion shows clearly that review under the "Ice" standard reaches only unobjected to errors that render the trial a miscarriage of justice. [776 S.W.2d at 369]. Certainly, this Court would not let stand a conviction which under "the totality of circumstances persuades [the] Court that the defendant may not have been found guilty of a capital offense or the death penalty may not have been imposed but for the unpreserved error." [776 S.W.2d 369]. Therefore, on the merits, this Court would reach no different result from that of the Supreme Court of Kentucky. In any event, Kentucky was not injured by the "Ice" rule in this case. The argument presented by Kentucky in this case is a complaint about review of the issue presented in Question 3 of this petition, concerning double jeopardy. Reference to the Kentucky Supreme Court opinion shows clearly that this issue was not reached under Ky. Rev. Stat. 532.075 or Ice v. Commonwealth, 667 S.W.2d 671, 674 (1984) but instead was decided under another state appellate rule which allows review of cumulative punishment double jeopardy cases even in the absence of timely objection. [776 S.W.2d at 372]. Under these circumstances, Kentucky has no standing to complain because it was not injured by the application of the so-called "Ice" rule. Kentucky's request here for a review of the federal constitutional issue is a request for an advisory opinion which should be denied.

The third issue raised is a complaint about the Kentucky Supreme Court's handling of the cumulative punishment issue. In its petition, Kentucky ignores the many recent decisions of this Court in which it says that it will not override a state court's construction of its own statutes. The Supreme Court of Kentucky has construed Ky. Rev. Stat. 507.020(1)(a) and Ky. Rev. Stat. 509.040 and has decided that the General Assembly of Kentucky did not intend cumulative punishments for these offenses. Relying on Ky. Rev. Stat. 505.020 the Supreme Court of Kentucky determined that the offenses merge. As shown in Argument III of this response, this Court has on several occasions stated that when the state court of last resort construes statutes federal courts will not overrule such a construction in determining double jeopardy issues. Obviously, for this reason as well the petition for writ of certiorari must be denied.

The issues set out above will be discussed in the order presented.

I. THE SUPREME COURT OF KENTUCKY PROPERLY DECIDED THAT COSBY WAS DENIED A FAIR TRIAL BECAUSE THE JURY COULD NOT KEEP THE EVIDENCE SEPARATED. ANY PROPOSED CONFLICT AMONG THE JURISDICTIONS CONCERNING REDACTION IS IRRELEVANT TO THIS CASE.

The Commonwealth of Kentucky has identified a conflict among the jurisdictions concerning the correct interpretation of footnote 5 of Richardson v. Marsh, 481 U.S. 200 (1987). Apparently some courts interpret Marsh to require excision of any reference to the co-defendant of the non-testifying confessor while others do not. (Petition, p. 11-12). The existence of such a controversy is irrelevant to this case because the Supreme Court of Kentucky, relying on its own Ky. R. Crim. Proc. 9.16 has ruled that Cosby is entitled to a trial separate from that of Chris Walls, the non-testifying confessor in this case. [Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky., 1989)]. The Supreme Court of Kentucky ruled

> "We are compelled to conclude that Cosby was so badly prejudiced by the failure to provide separate trials that his convictions must be reversed. In the peculiar circumstances of this case the jury could not individualize

Cosby in his relation to the mass of evidence represented by Walls' statement."

The Kentucky court went on to note that an admonition as to the correct use of this evidence was given, but not until the closing argument by the co-defendant in which he tried to imply that Cosby was the "blank" referred to in the statement. As the court noted, ". . . this was as likely to compound the error as to cure it." [776 S.W.2d at 369 and 370]. The court also later noted that neither the prosecutor nor the trial judge was able to keep the evidence straight. [776 S.W.2d at 370]. From these premises "[t]he only responsible conclusion is that in present circumstances this [individualization of evidence] cannot be done." [776 S.W.2d at 370-371]. It is for this reason that separate trials have been ordered.

There is no question that the Supreme Court of Kentucky applied Bruton v. U.S., 391 U.S. 123 (1968) and Richardson v. Marsh, 481 U.S. 200 (1987) correctly. The only important inquiry in a non-testifying co-defendant confession case is whether it is safe to assume that the jury will follow its instruction not to use the confession against anyone other than the person who made it. [Bruton, 391 U.S. at 135-136; Marsh, 481 U.S. at 208; 211]. If it is safe, courts will assume that the jury used the evidence for its proper, non-hearsay purpose and no confrontation issue arises. [Marsh, 481 U.S. at 211]. If it is not safe so to conclude, Bruton requires courts to recognize that ". . . the practical and human limitations of the jury system cannot be ignored." [Marsh, 481 U.S. at 207, citing Bruton, 391 U.S. at 135-136]. The issue then, according to Marsh, is whether the jury can reasonably be expected to forget what it heard in the co-defendant's confession when it is assessing the other defendant's guilt. [481 U.S. at 208]. And, of course, even if a confrontation error occurs, it, like other constitutional errors, may be deemed harmless if the reviewing court can say beyond a reasonable doubt that it did not affect the jury's determination. [Cruz v. New York, 481 U.S. 186, 194 (1987); Chapman v. California, 386 U.S. 18 (1967)]. The ruling of the

Supreme Court of Kentucky on this issue amounts to a paraphrase of this Court's holdings set out just above.

> "The fundamental premise in Bruton v. United States, supra, is that the confession of a co-defendant when utilized as evidence in a joint trial is prejudicial hearsay as to the non-confessing defendant to the extent that it incriminates him, and cannot be used unless the name of the non-confessing defendant can be so redacted or deleted that its use is harmless beyond a reasonable doubt." [Cosby v. Commonwealth, 776 S.W.2d at 370].

The Supreme Court of Kentucky has not misunderstood or misapplied this Court's precedents. Application of those precedents to the facts of this case show that there was practically no possibility that the jury would use Chris Walls' confession correctly.

In this case the prosecutor began by saying in opening that he could prove that Teddy Cosby was in the manager's office at Applegate's Landing and that he was at Fisherman's Park at the time Kevin Miller was killed. (TE 6, 14). In response to Cosby's objection, the prosecutor said that he could not use the statement to identify Cosby, but that he could use the statement to prove what had happened. (TE 6, 15). During the course of argument of the directed verdict at the close of the prosecutor's case the prosecution met respondent's argument that there was no proof that he participated in the crimes by saying that "with the statement, we know there was a second person who assisted Mr. Walls". (TE 10, 48). The prosecution also pointed out that Walls and Cosby had been together and that "[w]e know by Chris Walls' statement that during that time period is when the crime did occur." (TE 10, 49-50). As noted in the opinion, even the trial judge used Walls' statement in determining the propriety of the directed verdict motion made by Cosby. (776 S.W.2d at 370].

In ruling on respondent's objection to the prosecutor's closing argument that Cosby actually stabbed Kevin Miller the trial judge overruled saying that it was

> "An argument incorporating a reasonable inference from the evidence that has been introduced . . . The evidence introduced is the statement of Kevin (sic) Walls, the person that was with him did the stabbing. The evidence by the Commonwealth was that the person with him was Teddy Cosby, thus the reasonable inference

that Teddy Cosby did the stabbing." (TE 11, 84).

Of course, the only evidence that any person other than Chris Walls was at Fisherman's Park where Kevin Miller was stabbed was Walls' statement to police, which was inadmissible hearsay as to Cosby. If the trial judge thought this was fair use of the confession, there is little doubt that the jury would reach the same conclusion.

During the course of this same closing argument the prosecutor used Walls' statement to tie Cosby to the car that Walls used that night, and to argue that Cosby was the other person with Chris Walls in the Applegate's Landing office, armed with the kitchen knife that was the purported murder weapon. (TE 11, 96: 100-101). Of course, again, the evidence used by the prosecutor came from the statement made by Chris Walls. The only admonition about the proper use of this confession came during the co-defendant's closing argument. (TE 11, 64). This argument preceded the closing argument of the prosecutor. Obviously, the admonition had little effect, because the prosecutor did not hesitate to use Walls' confession to establish facts that would link Cosby with the offense. Thus, the Supreme Court of Kentucky correctly concluded that "this [admonition] was as likely to compound the error as to cure it." [Cosby, 776 S.W.2d at 369]. There can be no credible argument that the jury did not use the statement of Chris Walls in determining Teddy Cosby's guilt. Certainly, no court could find the use of such evidence harmless beyond a reasonable doubt. Thus, Kentucky's claim that the Supreme Court of Kentucky has misunderstood Marsh and Bruton is simply wrong. This claim is amply refuted in the state court opinion, particularly where the Supreme Court of Kentucky acknowledges that Marsh states a rule under which "a joint trial utilizing a properly redacted statement is appropriate where given the totality of circumstances no substantial prejudice will result." [Cosby, 776 S.W.2d at 370]. Kentucky's claim on this point must be rejected. The fact that there may be "confusion" among the jurisdictions as to footnote 5 of Marsh is not grounds to grant review in this case. In this case

the prosecutor systematically used the co-defendant's confession to establish critical points of evidence against Cosby. Of course redaction failed to prevent prejudice in this case. The only confusion present here is Kentucky's understanding of the Supreme Court of Kentucky's opinion. Review under these circumstances should be denied.

II. REVIEW SHOULD BE DENIED BECAUSE KENTUCKY IS ASKING THIS COURT FOR AN ADVISORY OPINION CONCERNING THE CONSTITUTIONAL UNDERPINNINGS OF KENTUCKY'S CAPITAL APPELLATE REVIEW RULE.

On page 13 of its petition, Kentucky points out that of 35 issues raised on direct appeal, 19 were unpreserved. Kentucky also notes on page 13 that the Supreme Court of Kentucky reversed, as to Cosby, on two grounds, one of which was unpreserved. "(Question #3 herein)". Question #3 concerns the cumulative punishment argument dealt with by the Supreme Court of Kentucky on pages 372-373 of the Kentucky court opinion. On page 372 the Supreme Court of Kentucky explicitly bases its review on the merits on state court rules as follows

> "Because this is a double jeopardy claim it must be considered even though it was not preserved by objection for appellate review. Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977)". [Cosby, 776 S.W.2d at 372].

The double jeopardy question was reviewed under a Kentucky legal principle which allows review of unpreserved cumulative punishment double jeopardy arguments. The Supreme Court of Kentucky premised its review explicitly on this rule by citing the cases set out in the excerpt. On direct appeal to the State Supreme Court respondent presented his claim under Ky. R. Crim. Proc. 10.26 (plain error rule) and Sherley v. Commonwealth, cited above. (Appellant's Brief, p. 97). This rule of Kentucky appellate law is applied consistently in criminal law cases. [e.g. Kinser v. Commonwealth, 741 S.W.2d 648, 654 (Ky., 1987), "of course a double jeopardy violation can be reviewed despite the lack of preservation."; Jones v. Commonwealth, 756 S.W.2d 462 (Ky., 1988),

"the appellant may properly raise a double jeopardy claim even though it was not preserved by objection for appellate review."]. It is clear that review of the double jeopardy claim in this case was based on state law dealing with double jeopardy claims and not on any law dealing with death penalty cases. This basis of review is a separate, adequate, and independent state ground as that concept is defined by Michigan v. Long, 463 U.S. 1032 (1983) and Kentucky v. Stincer, 482 U.S. 730 (1987). It is clear from the face of the Kentucky Supreme Court opinion that it is not following an Eighth or Fourteenth Amendment-compelled rule of review on this particular issue. Therefore, this Court has no grounds for assuming that the state court believed that its decision was compelled by federal law. [Michigan v. Long, 463 U.S. at 1040-1041]. Rather, the contrary conclusion is shown clearly in the state court opinion.

Kentucky does not present the Court with a justiciable controversy on this issue. Article III of the Constitution permits the Court to decide only cases or controversies. Because Kentucky does not show that it was injured by the ruling concerning Ky. Rev. Stat. 532.075 (if it was a ruling) it has no standing to complain. Even if the Court were to rule favorably on Kentucky's argument concerning Ky. Rev. Stat. 532.075 review, the ruling would have no effect. Review of the double jeopardy argument was based on other grounds. Therefore, Kentucky is asking this Court for an advisory opinion, ". . . a function never conferred upon it by the Constitution and against the exercise of which this Court has steadily set its face from the beginning." [Muskrat v. U.S., 219 U.S. 346, 361 (1911); 1 Rotunda, et. al, Treatise on Constitutional Law, §2.13, p. 98-100; 101-102 (1986)]. In this question Kentucky asks the Court to decide whether the Kentucky Supreme Court has misinterpreted the holdings of Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976), (Petition, p. 13-14) and is "laboring under the mistaken impression that the death is different approach required in evidentiary matters also requires a state court to abandon its rules of procedure." (Petition, p. 15). But the Supreme Court of Kentucky used its own

rules of procedure to reach and decide the question of double jeopardy in Cosby's case. Respondent therefore respectfully states that any resolution of Kentucky's claim about Beck and Woodson would be irrelevant to this case. In any event, it is clear that the comment concerning Beck and Woodson is simply dicta.

On page 369 of Cosby v. Commonwealth the court stated that its rule of review set out in Ice v. Commonwealth, 667 S.W.2d 671, 674 (Ky., 1984) "is generated by KRS 532.075, the statute specifying the duties of our Court in reviewing death penalty cases . . .". The court adopted this position because "[i]t is a function of the General Assembly to say when and if the death penalty shall be imposed, and this includes the right to prescribe the special type of review of punishment and errors enumerated by way of appeal prescribed in KRS 532.075, limited only by the Kentucky Constitution, the United States Constitution, and the decisions of the United States Supreme Court." [776 S.W.2d at 369]. Fair reading of the state court opinion shows that review in death penalty cases is a result of the Kentucky Supreme Court's construction of Ky. Rev. Stat. 532.075. Any discussion of this Court's cases is simply an explanation of the source of the "idea of imposing a higher standard of review in cases where the death penalty has been imposed . . .". [776 S.W.2d at 369]. Therefore, the state is asking this Court to review dicta comments made by the Supreme Court of Kentucky. This is not a proper use of the certiorari power. And, in any event, this Court certainly would agree that any court should review an error, preserved or unpreserved, that under the circumstances persuades the Court that the defendant might not have been found guilty of a capital offense or sentenced to death but for the error.. That is all the "Ice" rule says. [776 S.W.2d at 369]. Because no useful purpose would be served by consideration of Question #2, certiorari should be denied.

III. THE KENTUCKY SUPREME COURT CORRECTLY INTERPRETED STATE CRIMINAL STATUTES GOVERNING KIDNAPPING AND MURDER. FEDERAL COURTS DO NOT RE-INTERPRET STATUTES CONSTRUED BY A STATE COURT OF LAST RESORT IN CUMULATIVE PUNISHMENT DOUBLE JEOPARDY CASES.

In Banner v. Davis, 886 F.2d 777, 779-781 (6th Cir., 1989) the basic principles of cumulative punishment analysis are set out: (1) The double jeopardy clause protects against multiple punishments for the same offense. [Brown v. Ohio, 432 U.S. 161, 165 (1977)]; (2) Whether punishments are "multiple" under the double jeopardy clause is essentially a question of legislative intent. [Missouri v. Hunter, 459 U.S. 359, 366-368 (1983)]; (3) When assessing the intent of a state legislature, a federal court is bound by a state court's construction of that state's own statutes. [Missouri v. Hunter, 459 U.S. at 368]; and (4) The Blockburger [v. U.S., 284 U.S. 299 (1932)] test is simply a rule of federal statutory construction. [Whalen v. U.S., 445 U.S. 684, 691-692; Banner v. Davis, 886 F.2d at 781].

In Ohio v. Johnson, 467 U.S. 493, 499, fn. 8 (1983) the Court held that ". . . the Blockburger test does not necessarily control the inquiry into the intent of the state legislature." From this it is clear that Blockburger is not necessarily a test for determining federal constitutional violations. Kentucky's reliance on the case as a federal test for determining cumulative punishment violations (Petition, p. 19) is misplaced. The inquiry here is not whether the Supreme Court of Kentucky may have misapplied a federal standard. The inquiry rather is what types of punishment the General Assembly of Kentucky intended to allow when it enacted Ky. Rev. Stat. 507.020 and Ky. Rev. Stat. 509.040. The only court authorized to make that determination is the Supreme Court of Kentucky.

In its opinion, the Supreme Court of Kentucky applied Ky. Rev. Stat. 505.020(2)(a) which provides that an offense merges with another when it is established by proof of the same or less than all of the facts required to establish the commission of the [other] offense." [Cosby, 776 S.W.2d at 372]. The Kentucky court noted that this is a statutory codification of Blockburger, but

that the rule could not be applied in the abstract. Thus, under the circumstances of this case, where the proof of murder is relied on to establish the capital offense of kidnapping, "the offenses merge." [776 S.W.2d at 373]. This is because ". . . [t]he additional element that aggravates kidnapping to a capital offense is the murder." [776 S.W.2d at 373]. The validity of this conclusion is shown easily by reference to the statutes involved.

The jury in this case was instructed on intentional murder and on kidnapping, capital offense. (TR, 423-425). Intentional murder is proved when the prosecutor shows that the defendant, with the intent to cause the death of another, causes the death of that person or of a third person. [Ky. Rev. Stat. 507.020(1)(a)]. Kidnapping consists of unlawful restraint of another with the intent to accomplish one of five unlawful purposes. [Ky. Rev. Stat. 509.040(1)]. It is a capital offense when the kidnapped person is not released alive. [Ky. Rev. Stat. 509.040(2)]. The phrase "when the victim is not released alive" refers to the victim's death caused by some aspect of the kidnapping. [776 S.W.2d at 372]. This conclusion is compelled by the limitation on criminal liability found at Ky. Rev. Stat. 501.030 which prohibits conviction of a criminal offense unless there is the conjunction of a voluntary act or omission and a culpable mental state as defined in Ky. Rev. Stat. 501.020. Murder consists of the voluntary act of killing another and the conscious purpose to do so. Certainly, the phrase not released alive is broad enough to encompass such an act. Obviously, the Supreme Court of Kentucky accepted respondent's argument that this language was broad enough to cover the murder of the kidnap victim. This construction of Kentucky's statutory language is not open to question at this point. [Missouri v. Hunter, 459 U.S. at 368]. The Kentucky Supreme Court has determined, by a method provided by the General Assembly of Kentucky [Ky. Rev. Stat. 505.020], that the General Assembly did not intend cumulative punishments for murder and capital kidnapping. Because of this finding, the issue of double jeopardy is closed. Because grant of certiorari on this

issue could serve no useful purpose respondent respectfully moves the Court to deny Kentucky's request for certiorari.

CONCLUSION

For the reasons set out above the Court is urged to deny the petition for writ of certiorari requested in this case.

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